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4 FREDDY MCCARDIE,  
5 Plaintiff,  
6 v.  
7 GREGORY J. AHERN, et al.,  
8 Defendants.

9 Case No. [20-cv-01408-EMC](#)  
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**ORDER VACATING DISMISSAL  
ORDER AND DISMISSING  
COMPLAINT WITH LEAVE TO  
AMEND**

Docket Nos. 1, 15

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14 I. **INTRODUCTION**

15 Freddy McCardie, a prisoner currently housed at the California State Prison - Corcoran,  
16 filed this *pro se* civil rights action under 42 U.S.C. § 1983. His complaint is now before the court  
17 for review under 28 U.S.C. § 1915A. His motion to compel prison officials to file a copy of his  
18 trust account statement also is before the Court for review.

19 II. **BACKGROUND**

20 A. **Vacating The Dismissal And Reopening The Action**

21 When Mr. McCardie filed his complaint on February 11, 2020, he also filed a one-page  
22 unsigned *in forma pauperis* application. Docket No. 2. The clerk sent a notice on February 25,  
23 2020, that Mr. McCardie needed to file a completed *in forma pauperis* application, including a  
24 certified copy of his inmate trust account statement, within 28 days or the action would be  
25 dismissed. Docket No. 6. That notice was returned undelivered because Mr. McCardie was no  
26 longer in custody at Santa Rita Jail, as he apparently had been sent to prison but had not informed  
27 the Court of his new address. *See* Docket No. 8. This action was dismissed on June 5, 2020  
28 because Mr. McCardie had not filed a completed *in forma pauperis* application and the deadline

1 by which to do so had passed. Docket Nos. 13, 14. Mr. McCardie then filed a motion to compel  
2 prison officials to send a copy of his inmate trust account statement to the Court. Docket No. 15.  
3 Shortly thereafter, Mr. McCardie filed an *in forma pauperis* application with his inmate trust  
4 account statement, as well as a document showing he had not asked prison officials for a copy of  
5 his trust account statement until after this action was dismissed. Docket No. 16 at 3.

6 Due to the possibility that Mr. McCardie was unaware his original *in forma pauperis*  
7 application was deficient and he needed to file a complete *in forma pauperis* application, and  
8 given that the Court has now received an application with a trust account statement, the Court will  
9 vacate the dismissal and move forward with this action. Accordingly, the order of dismissal and  
10 judgment entered June 5, 2020, are now **VACATED**. The Clerk shall reopen the action.

11 Plaintiff's motion to compel prison officials to send a copy of the inmate trust account  
12 statement is **DENIED** as unnecessary because the Court has now received that document. Docket  
13 No. 15. The *in forma pauperis* application will be ruled on in a separate order issued today.

14 B. Allegations of the Complaint

15 The complaint alleges the following: On September 19, 2017, Mr. McCardie was riding in  
16 a bus operated by the Alameda County Sheriff's Department that had no seat belts available to  
17 inmates being transported in the bus. While travelling en route to the courthouse, the Sheriff's bus  
18 was hit on the side by a car. As a result of the car hitting the bus, Mr. McCardie was thrown from  
19 his seat and hurt his knee, elbow, back, and neck.

20 The complaint further alleges that jail medical staff did not provide adequate medical care  
21 for the injuries Mr. McCardie sustained in the bus accident. Docket No. 1 at 15. He alleges that  
22 the Tylenol provided to him was not strong enough and the x-rays taken did not encompass all the  
23 areas where he was hurt. He also alleges that it took about six weeks to obtain a cane.

24 III. DISCUSSION

25 A federal court must engage in a preliminary screening of any case in which a prisoner  
26 seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28  
27 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any  
28 claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or

1 seek monetary relief from a defendant who is immune from such relief. *See id.* at § 1915A(b).  
2 *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d  
3 696, 699 (9th Cir. 1990).

4       Although a complaint “does not need detailed factual allegations, . . . a plaintiff’s  
5 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
6 conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . .  
7 Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell*  
8 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint must  
9 proffer “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.

10       Federal courts are courts of limited jurisdiction. As relevant here, the court only has  
11 jurisdiction to entertain this action if it raises a federal question, such as a civil rights claim  
12 asserted under 42 U.S.C. § 1983. (There are other federal statutes that grant other bases of federal  
13 court jurisdiction, but none are applicable to this action.) In simple terms, this action can go  
14 forward in federal court if a claim is stated under § 1983; if the complaint does not state a claim  
15 under § 1983, the plaintiff should pursue his claims in state court.

16       To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a  
17 right secured by the Constitution or laws of the United States was violated and (2) that the  
18 violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487  
19 U.S. 42, 48 (1988).

20       The complaint fails to state a claim upon which relief may be granted. As discussed  
21 below, there are problems with the substance of his claims about the accident and the medical  
22 care, as well as with the Defendants. Leave to amend is granted so that Mr. McCardie may file an  
23 amended complaint that cures the several problems discussed in this order.

24       A.     The Vehicle Accident

25       Deliberate indifference to an inmate’s safety may violate the Eighth Amendment or the  
26 Fourteenth Amendment. Which of those amendments applies to an inmate’s claim depends on  
27 whether he was a convicted prisoner or was a pretrial detainee at the relevant time: a convict’s  
28 claim arises under the Eighth Amendment’s Cruel and Unusual Punishments Clause while a

1 pretrial detainee's claim arises under the Fourteenth Amendment's Due Process Clause. The two  
2 amendments have different standards.

3 Deliberate indifference to a *prisoner*'s safety needs may violate the Eighth Amendment. A  
4 defendant violates the Eighth Amendment only when two requirements are met: (1) the  
5 deprivation alleged is, objectively, sufficiently serious, and (2) the official is, subjectively,  
6 deliberately indifferent to the inmate's health or safety. *See Farmer v. Brennan*, 511 U.S. 825,  
7 834 (1994). A defendant is deliberately indifferent if he knows that a prisoner faces a substantial  
8 risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. *Id.* at  
9 837. The defendant must not only "be aware of facts from which the inference could be drawn  
10 that a substantial risk of serious harm exists," but he "must also draw the inference." *Id.* If the  
11 defendant should have been aware of the risk, but was not, then he has not violated the Eighth  
12 Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290 F.3d 1175, 1188  
13 (9th Cir. 2002). Negligence does not violate the Eighth Amendment. *See Toguchi v. Chung*, 391  
14 F.3d 1051, 1060-61 (9th Cir. 2004).

15 A *pretrial detainee*'s claim arises under the Fourteenth Amendment's Due Process Clause  
16 and is governed by an *objective* deliberate-indifference standard rather than the subjective one that  
17 applies to a convict's claim.

18 [T]he elements of a pretrial detainee's [safety or] medical care claim  
19 against an individual defendant under the due process clause of the  
20 Fourteenth Amendment are: (i) the defendant made an intentional  
21 decision with respect to the conditions under which the plaintiff was  
22 confined; (ii) those conditions put the plaintiff at substantial risk of  
23 suffering serious harm; (iii) the defendant did not take reasonable  
available measures to abate that risk, even though a reasonable  
official in the circumstances would have appreciated the high degree  
of risk involved—making the consequences of the defendant's  
conduct obvious; and (iv) by not taking such measures, the  
defendant caused the plaintiff's injuries.

24 *Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). For the third element, the  
25 defendant's conduct must be objectively unreasonable, "a test that will necessarily 'turn[] on the  
26 facts and circumstances of each particular case.'" *Id.* (alteration in original) (quoting *Castro v.*  
27 *County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016)). "[T]he plaintiff must 'prove more  
28 than negligence but less than subjective intent—something akin to reckless disregard.'" *Id.*

1 (quoting *Castro*, 833 F.3d at 1071).

2 The complaint fails to allege facts sufficient to state a claim that any Defendant acted with  
3 deliberate indifference to Mr. McCardie's safety needs. The complaint suggests this was a car  
4 crash caused by a third party, rather than for example, the Sheriff's bus driver purposely causing  
5 the bus to crash. The facts alleged suggest potential negligence but do not plausibly suggest  
6 deliberate indifference under either a subjective or objective standard.

7 An Eighth Amendment claim is not stated because Mr. McCardie does not allege facts to  
8 plausibly suggest either prong of an Eighth Amendment claim. He does not allege facts  
9 suggesting that being in a bus without a seatbelt poses an objectively serious risk to a passenger's  
10 health or that the bus was being driven in a dangerous manner. It is not obviously uncommon for  
11 bus passengers (other than students on a school bus) to be unbelted. At least the complaint fails to  
12 allege otherwise. Nor does Mr. McCardie allege facts suggesting that any Defendant actually  
13 knew that transporting him in the bus in the manner that he was transported presented a substantial  
14 risk to his health or safety.

15 A Fourteenth Amendment claim is not stated because the facts alleged do not plausibly  
16 suggest that Mr. McCardie was "at substantial risk of suffering serious harm" as a result of the  
17 conditions of his confinement. *Gordon*, 888 F.3d at 1125. Nor does he allege facts suggesting  
18 that any "defendant did not take reasonable available measures to abate that risk [of the plaintiff  
19 suffering serious harm], even though a reasonable official in the circumstances would have  
20 appreciated the high degree of risk involved." *Id.* Nor does he allege that, by not taking such  
21 reasonable measures, any Defendant caused Mr. McCardie's injuries. *See id.*

22 Leave to amend is granted so that Mr. McCardie may file an amended complaint that  
23 proffers enough facts to state a claim to relief for an Eighth Amendment violation if he was a  
24 convict on the day of the accident. If Mr. McCardie was a pretrial detainee at the relevant time, he  
25 must allege facts in his amended complaint showing the existence of the elements identified in  
26 *Gordon* to state a claim to relief for a Fourteenth Amendment violation. In his amended  
27 complaint, he must state whether he was a pretrial detainee or a convict on the relevant day. (A  
28 convict would include an inmate whose criminal trial had already occurred, even if he had not yet

1 been sentenced. *See Resnick v. Hayes*, 213 F.3d 443, 447-48 (9th Cir. 2000).) Mr. McCardie also  
2 needs to link one or more Defendants to this claim, as discussed in Section C, below.

3 B. Medical Care Claim

4 Mr. McCardie alleges deficient medical care at the Santa Rita Jail. As with the vehicle-  
5 accident claim, the medical-care claim arises under the Eighth Amendment if Mr. McCardie was a  
6 convict and under the Fourteenth Amendment if Mr. McCardie was a pretrial detainee at the  
7 relevant time. The same legal standards set out for both amendments in the preceding section  
8 apply to his medical-care claim.

9 Mr. McCardie's allegations that the Tylenol provided to him was not strong enough, the x-  
10 rays did not cover all painful parts of his body, and it took six weeks to get a cane do not state a  
11 claim upon which relief may be granted because he does not allege facts showing that any  
12 Defendant acted with the required mental state of deliberate indifference. The records attached to  
13 the complaint include a grievance response that discusses numerous instances of medical care for  
14 Mr. McCardie that appear inconsistent with an assertion of constitutionally inadequate medical  
15 care. Docket No. 1 at 4, 7. If that document is correct, Mr. McCardie was evaluated by a  
16 physician's assistant the day after the accident and was prescribed Tylenol; x-rays done on  
17 September 25 of his left elbow, lumbar spine, sacrum, and coccyx were unremarkable; after he  
18 complained on October 4 about continued pain from the accident, he was seen by a nurse who  
19 obtained a prescription for Tylenol for 14 days, heat packs for 14 days, and a physical therapy  
20 referral for him; when he complained to a physician's assistant on October 23 that Tylenol was not  
21 controlling his pain, the physician's assistant prescribed Tramadol for 14 days and reordered hot  
22 packs; Nabumetone was ordered on November 6 when he asked for a renewal of pain medication;  
23 he was examined on November 6 and 7 for pain complaints and his medications were not changed;  
24 and he received stretching instructions and a continuation of the Nabumetone at a visit on  
25 November 15. The many reported instances of medical care tend to suggest that members of the  
26 jail medical staff were not deliberately indifferent to Mr. McCardie's medical problems.

27 Leave to amend is granted so that Mr. McCardie may file an amended complaint that  
28 proffers enough facts to state a claim to relief for an Eighth Amendment violation regarding his

1 medical care if he was a convict during the relevant time. If Mr. McCardie was a pretrial detainee  
2 at the relevant time, he must allege facts in his amended complaint showing the existence of the  
3 elements identified in *Gordon* to state a claim to relief for a Fourteenth Amendment violation. In  
4 his amended complaint, he must state whether he was a pretrial detainee or a convict on the  
5 relevant day and must link one or more Defendants to this claim, as discussed in Section C, below.

6 C. Linking Defendants To The Claims

7 The complaint identifies five Defendants – Alameda County Sheriff Ahern, a doctor, and  
8 three members of the correctional staff – but does not allege what any of them did or failed to do  
9 to violate Mr. McCardie’s constitutional rights.

10 There is no respondeat superior liability under § 1983, i.e. no liability under the theory that  
11 one is liable simply because he employs a person who has violated a plaintiff’s rights. *See Monell*  
12 *v. Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.  
13 1989). Thus, the mere fact that an alleged individual wrongdoer may have been employed by  
14 Sheriff Ahern is not a sufficient basis on which to hold Sheriff Ahern liable.

15 If Mr. McCardie wishes to pursue claims against individual Defendants, he must be careful  
16 to allege facts showing the basis for liability for each individual Defendant. He should not refer to  
17 them as a group (e.g., “the defendants”); rather, he should identify each involved Defendant by  
18 name and link each of them to his claim by explaining what each Defendant did or failed to do that  
19 caused a violation of his constitutional rights. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir.  
20 1988) (liability may be imposed on individual defendant under § 1983 only if plaintiff can show  
21 that defendant proximately caused deprivation of federally protected right). A supervisor may be  
22 liable under § 1983 upon a showing of (1) personal involvement in the constitutional deprivation  
23 or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the  
24 constitutional violation. *See Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011).

25 IV. CONCLUSION

26 The order of dismissal with leave to amend and judgment entered on June 5, 2020 are  
27 **VACATED**. Docket Nos. 13, 14. The Clerk will reopen this action.

28 Plaintiff’s motion to compel prison officials to submit a copy of his inmate trust account

1 statement is **DENIED** as unnecessary. Docket No. 15.

2 The complaint fails to state a § 1983 claim upon which relief may be granted. Leave to  
3 amend is granted so that Plaintiff may attempt to allege the violation of his constitutional rights in  
4 an amended complaint. The amended complaint must be filed no later than **September 4, 2020**,  
5 and must include the caption and civil case number used in this order and the words AMENDED  
6 COMPLAINT on the first page. Plaintiff is cautioned that his amended complaint must be a  
7 complete statement of his claims. *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir.  
8 2012) (en banc) (“For claims dismissed with prejudice and without leave to amend, we will not  
9 require that they be replied in a subsequent amended complaint to preserve them for appeal. But for  
10 any claims voluntarily dismissed, we will consider those claims to be waived if not replied.”)  
11 Failure to file the amended complaint by the deadline will result in the dismissal of the action.

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13 **IT IS SO ORDERED.**

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15 Dated: July 24, 2020

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EDWARD M. CHEN  
United States District Judge

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